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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SAN DIEGO UNIFIED PORT) Civil No.07-1955-GPC(WVG)
12 DISTRICT,)
13 Plaintiff,) ORDER REGARDING
14 v.) PLAINTIFF'S LIABILITY
15) FOR ONE-THIRD OF
16 GENERAL DYNAMICS) INVESTIGATION COSTS
CORPORATION, LOCKHEED) AT THE TOW BASIN SITE
MARTIN CORPORATION,)
17 Defendants.) (DOC. NO. 51)
18 _____)
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20 On July 12, 2013, the Court ordered Plaintiff San
21 Diego Unified Port District ("Plaintiff" or "Port") and
22 Defendants General Dynamics Corporation and Lockheed
23 Martin Corporation ("Defendants") to file briefs regarding
24 Plaintiff's liability for one-third of the investigation
25 costs at the Tow Basin Site ("Site"). On August 9, 2013,
26 Defendants filed their Opening Brief. On August 16, 2013,
27 Plaintiff filed its Opposition to Defendants' Opening
28 Brief. On August 23, 2013, Defendants filed a Reply to

1 Plaintiff's Opposition. On September 9, 2013, the Court
2 held a hearing regarding this matter.

3 The Court, having reviewed the Moving, Opposition,
4 and Reply papers, and having heard oral argument, and GOOD
5 CAUSE APPEARING, HEREBY FINDS AND ORDERS as follows:

6 A. 1998 Cost Allocation Agreement

7 On January 9, 1998, the California Department of
8 Toxic Substances Control ("DTSC") issued an Imminent Or
9 Substantial Endangerment Determination & Remedial Order
10 ("Order") (Defendant's Opening Brief, Exh. A). The Order
11 required the parties to investigate "the nature and full
12 extent of hazardous substance contamination of air, soil,
13 surface, water, and groundwater at the Site, including
14 offsite areas affected by the Site, as well as to perform
15 any remedial action necessary to address such contamina-
16 tion. (Defendant's Opening Brief, Exh. A, §§ 5.1.1, 5.1.2,
17 5.2).

18 After the Order was issued, in July 1998, the
19 parties entered into an Interim Settlement & Participation
20 Agreement ("1998 Agreement") (Defendant's Opening Brief,
21 Exh. B). In this Agreement, the parties agreed to cooper-
22 ate in the investigation and cleanup of the hazardous
23 substances at the Site and to split costs associated with
24 the Site investigation in equal one-third shares. (Defen-
25 dant's Opening Brief, Exh. B, para. 2, 3, 6).

26 The parties agreed that if the Port's portion of
27 costs exceeded \$150,000, then prior approval of the Port
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Commissioners must be obtained. (Defendant's Opening Brief, Exh. B, paras. 2, 3)

The allocations set forth for cleanup were final and are not subject to appeal, arbitration or any other further action by any party. The parties waived their rights to a jury trial as to any dispute arising from the allocation. (Defendant's Opening Brief, Exh. B, para. 5).

The 1998 Agreement also contains the following clauses:

To facilitate payment of the investigative, removal and remediation costs identified in this Agreement, the Parties agree that the Contractor responsible for conducting the work shall be required to send copies of its invoices to each party at least 45 days prior to payment being due. *Each party shall be responsible for the timely payment of its share directly to the Contractor.*

Each Party's timely payment to the Contractor is an independent obligation. If any Party(ies) fails/fail to pay its/their full share or any portion thereof in a timely manner, the other Party(ies) [the 'Paying Party(ies)'] shall make such payment in equal share so that the Contractor is paid in full within ninety days of the date of the original invoice.

Any party that fails to pay its full share in a timely manner will be in breach of this agreement. The Paying Party(ies) shall have the right to seek recovery of such payment, interest, cost and attorney fees in a civil action for reimbursement from the non-Paying Party(ies) notwithstanding the provisions set out in Paragraph 2 of Article 1 herein.^{1/}
(Defendants' Opening Brief, Exh. B, para. 21)(emphasis added).

^{1/}Paragraph 2 of Article 1 refers to Defendants' Opening Brief, Exh. B, para. 2, in which the parties agreed to split the costs associated with the Site investigation in equal one-third shares.

1 B. 2006 Interim Cost Sharing Agreement

2 After the Port filed suit against Defendants, and
3 after mediation, the parties entered into the 2006 Interim
4 Cost Sharing Agreement (Defendant's Opening Brief, Exh. C)
5 wherein the parties agreed to each pay one-third of the
6 groundwater and sediment investigation costs, subject to
7 the Port's seeking an agreement from its insurers that the
8 insurers will pay the Port's one-third share of the costs.
9 If the insurers did not agree to pay the Port's one-third
10 share, any party would have been able to withdraw from
11 making any further payments and the issue would be medi-
12 ated with a named mediator. The Port does not present any
13 evidence or argument that the insurers refused to pay its
14 one-third share.^{2/}

15 On November 13, 2009, counsel for Defendant General
16 Dynamics sent a letter to the DTSC, the Regional Water
17 Quality Control Board ("Regional Board"), counsel for
18 Lockheed Martin, and counsel for the Port in anticipation
19 of the transfer of oversight of the Site from the DTSC to
20 the Regional Board. (Defendants' Opening Brief, Exh. E).
21 The purpose of the letter was to ensure that all parties
22 understood that the transfer was "not intended to impact
23 (the July 1998) Agreement in any manner." (Defendants'
24 Opening Brief, Exh. E). Counsel for General Dynamics
25 invited the parties to correct him if his understanding
26 was incorrect. There is no evidence in the record before

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28 ^{2/}The 1998 Cost Allocation Agreement and the 2006 Interim Cost Sharing Agreement will be referred to as the "Agreements."

1 the Court that any party, particularly the Port, disagreed
2 with this expectation.

3 C. Port's Refusal to Fund Stressor Identification
4 Analysis ("SIA")

5 In January 2010, the Regional Board took over as the
6 lead agency overseeing the Site. The transfer of the
7 investigation and remediation of the Site was agreed to by
8 all parties. The Regional Board requested the parties to
9 undertake additional sediment sampling at the Site in
10 accordance with the Water Quality Control Plan, adopted in
11 2009. Although the Port paid its share of costs of con-
12 ducting additional sampling in accordance with the Water
13 Quality Control Plan, the Port has since refused to
14 contribute any further funding for the SIA required by the
15 Water Quality Control Plan and Order.

16 D. Arguments

17 1. Port's Alleged Conflict of Interest

18 a. Port's Arguments

19 The Port argues that it has a conflict of interest
20 regarding funding the SIA because the SIA relates to an
21 allocation of liability - the cause of the harm. The Port
22 likens the SIA to a Court allocating cleanup responsibili-
23 ties under the Comprehensive Environmental Response,
24 Compensation & Liability ACT ("CERCLA").

25 The Port argues that the Regional Board points to
26 two stressors that are not related to toxic pollutants:
27 (1) physical alteration of the Site (i.e. impacts of
28 dredging) and (2) other pollutant-related stressors. As to
the first stressor, "physical alteration," the Port, not

1 Defendants, may be arguably responsible for the Site's
2 physical configuration. If the sole cause of the impair-
3 ment of the Site is the physical configuration of the Site
4 (which, the Port argues, is what Defendants seek to prove
5 by the SIA), then Defendants may avoid all liability.
6 However, the burden is on Defendants to show that they do
7 not have liability. The Port asserts that it should not
8 have to partially fund Defendants' defense. As a result,
9 the Port contends that a conflict of interest exists that
10 prevents it from contributing to, and using a joint
11 consultant in the SIA. Therefore, the Port should not be
12 required to partially fund the SIA that might implicate
13 its liability, while supporting Defendants' efforts to
14 avoid liability. (Port's Opposition at 2-4).

15 The Port contends with regard to the second
16 stressor, "other pollutant-related stressors," also shows
17 that the SIA pertains to allocation of liability. The
18 Regional Board will focus on a "single discharger," where
19 appropriate, requiring the discharger to "reduce the
20 pollutant loading into the sediment." If the Port's storm
21 drain system is a source of "other pollutant-related
22 stressors, the Board *could* address the drainage system, at
23 great expense to the Port. Thus, the SIA *could* lead
24 directly to liability/allocation.

25 b. Defendants' Arguments

26 Defendants argue that the Port's alleged conflict of
27 interest is speculative and was understood at the time the
28 Agreements were executed. The Port claims that it cannot

1 fund the SIA because a conflict exists *to the extent that*
2 the results may indicate that the Port is responsible for
3 the alleged impairment of the Site *if* the second phase of
4 the SIA (if needed) shows that certain contaminants
5 contribute to the impairment more than other contaminants.
6 However, until the SIA is complete, and if the parties are
7 required to expend remedial costs, there is no conflict of
8 interest.

9 Further, Defendants argue that the type of conflict
10 to which the Port refers exists within all aspects of the
11 investigation, including those already funded by the Port.
12 Defendants assert that the investigation is to obtain data
13 to use to determine whether remediation is required, and
14 if so, by whom, to what extent, and at what allocated
15 costs. The SIA is no different from the investigation
16 already conducted in which the Port has contributed its
17 allocated share without any objection regarding a conflict
18 of interest.

19 Defendants also argue that the Port is contractually
20 liable for one-third of the investigation costs at the
21 Site. Defendants argue that there can be no dispute as to
22 the contractual language in the Agreements because the
23 language is clear and not susceptible to the Port's
24 interpretation.

25 Defendants also contend that none of the parties is
26 voluntarily undertaking the SIA. They are doing so pursu-
27 ant to the Order. The Port previously supported the SIA as
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1 documented in a Joint Case Management Conference Statement
2 signed by all parties. (Defendants' Reply, Exh. B at 2).

3 Defendants also argue that the SIA is an investiga-
4 tion cost covered by the Agreements. The Agreements can
5 have no other interpretation but that the SIA required by
6 the Regional Board is investigative, not remedial. The SIA
7 is an analysis consisting of (1) confirmation of chemical
8 linkage and (2) identification of cause. The SIA is aimed
9 at addressing the Site's conditions for purposes of
10 creating an appropriate remedy. This statement is con-
11 firmed by the Regional Board's statements which make clear
12 that the SIA is intended to distinguish between chemical
13 and physical causes, not allocate liability among the
14 parties. (Defendant's Opening Brief, Exh. F).

15 Finally, Defendants argue that at the time the
16 Agreements were executed, the parties did not know the
17 exact amount, type, duration, or cost of the investiga-
18 tions the regulatory agency would require, but all parties
19 agreed to the equal one-third allocation.

20 2. Port's Allegations That Regulatory Circum-
21 stances Have Changed, Making The Agreements
Inapplicable To This Dispute

22 a. Port's Arguments

23 The Port argues that at the time the Agreements were
24 executed, the DTSC never identified the Port as a polluter
25 and it cited only four hazardous substances, all stemming
26 from Defendants' operations. The Order did not mention
27 linking harm at the Site to "physical alteration," or
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1 "other pollutant-related stressors," other than toxic
2 contaminants. (Port's Opposition at 5-6).

3 The Port argues that the Agreements were limited to
4 the DTSC's Order, and to the Site only. At the time the
5 Agreements were executed, the DTSC was the lead agency
6 whose Order was the only Order expressly addressed in the
7 Agreements. (Port's Opposition at 5-6).

8 In 2010, the Regional Board took over administration
9 of the Site and issued three new directives. The direc-
10 tives resulted in incongruent results, requiring further
11 analysis. (Port's Opposition at 6). Despite the Port's
12 objections, Defendants hired a consultant and submitted a
13 plan for further analysis to the Regional Board. Thus, the
14 Port and Defendants are not sure what path the Regional
15 Board will take in the future, given the new directives
16 and their results.

17 The Port contends that since the Agreements were
18 executed, the regulatory landscape has changed. At the
19 time of the Agreements, there was one agency (DTSC) and
20 one order (of the DTSC). Now, there is another regulatory
21 agency (Regional Board) and its orders. The Port does not
22 believe that the Agreements can be construed to apply to
23 the Regional Board's new directives. (Port's Opposition at
24 6-7).

25 b. Defendants' Arguments

26 Defendants argue that the Port's position that the
27 Agreements are limited to landside investigation overseen
28 by the DTSC and are not applicable to the sediment inves-

1 tigation overseen by the Regional Board is untenable.
2 There is no support for the Port's assertion. The Agree-
3 ments pertain to investigations related to sediment; they
4 are not limited to landside investigations.

5 Defendants argue that the transfer of authority from
6 the DTSC to the Regional Board was agreed upon by the
7 parties. The parties agreed that the work to be performed
8 at the direction of the Regional Board would be deemed
9 consistent with, and in satisfaction of, the terms of the
10 Order. (Defendants' Opening Brief, Exh. D, para. 2, Exh.
11 E). No party, including the Port, objected or expressed a
12 different understanding of the implications of the trans-
13 fer at the time it occurred. The Port should not be able
14 to do so now.

15 3. Port's Interpretation of Agreement With
16 Regard To Costs
a. Port's Argument

17 The Port argues that the 1998 Agreement states that
18 if the Port's share of costs exceed \$150,000, the prior
19 approval of the Port Commissioners must be first obtained.
20 The Agreement does not mandate the Port Commissioners'
21 approval. Since 2006, the Port's investigative costs total
22 at least \$186,243. This does not include investigative
23 costs for landside and groundwater investigations (which
24 were not part of the 1998 Agreement) from 1998 to 2006.
25 Assuming that the SIA is an investigative cost, the Port
26 Commissioners have never approved any additional joint
27 investigative expenditures. (Port's Opposition at 4-5).

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1 b. Defendants' Argument

2 Defendants argue that the Port's invocation of the
3 language in the 1998 Agreement regarding the Port Commis-
4 sioners' approval for investigative costs over \$150,000 is
5 disingenuous because the Port was silent on this matter,
6 which led Defendants to believe that costs over \$150,000
7 were approved under the 1998 Agreement. At no time did the
8 Port ever inform Defendants that its costs exceeded
9 \$150,000 and needed further approval of the Port Commis-
10 sioners to pay more than \$150,000. Pursuant to the Agree-
11 ment, the time to have informed Defendants that the Port's
12 costs were approaching \$150,000 was when the costs were
13 approaching \$150,000, not after the costs exceeded
14 \$150,000.

15 4. Port's Arguments Regarding Specific Perform-
16 ance of the Agreements

17 a. Port's Argument

18 The Port argues that Defendants actually seek
19 specific performance of the Agreements. But Defendants
20 cannot obtain this remedy because they have already
21 breached the Agreements in a material way. In particular,
22 a "Project Coordinator" was to be designated by the
23 Parties. That person was required to convey only "agreed
24 to communications" to the lead agency, provide all parties
25 with comment opportunities and advocate the parties'
26 position to the lead agency. (Defendants' Opening Brief,
27 Exh. B, para. H). The Port expressed its disagreement with
28 Defendants moving forward with the SIA and with Defen-
dants' position regarding "toxicity" readings at the Site.

1 If Defendants disagreed with the Port's position, Defen-
2 dants' express remedy was to mediate the matter or to seek
3 the Court's involvement if they deemed the Port to be in
4 material breach. (Defendants' Opening Brief, Exh. B,
5 para. 10). Instead, Defendants breached the Agreement by
6 hiring their own consultant to conduct the SIA, communi-
7 cating with the Regional Board without the Port's input,
8 and without informing the Port of the outcome. (Port's
9 Opposition at 8-9 and Exh. 7).

10 The Port proposes that Defendants pay for the SIA
11 now, and if the Court finds, after trial or Motion for
12 Summary Judgment, that Defendants are correct, they may
13 obtain reimbursement, as noted in the 1998 Agreement
14 (Port's Opposition at 9) (Defendants' Opening Brief, Exh.
15 B, at 14, first full para.)

16 b. Defendants' Argument

17 Defendants argue that they gave the Port every
18 opportunity to address its refusal to contribute to
19 investigative costs and participate in the SIA, as re-
20 quired by the Agreements. Defendants invited the Port to
21 provide input in the SIA work proposal and the choice of
22 consultants for the work. Further, the Port has provided
23 input to the Regional Board concerning the process, and in
24 Case Management Conferences with the Court, at which the
25 parties discussed the SIA. The Port has been involved in
26 the SIA process throughout this case, except for paying
27 for it. The Port has worked with the Regional Board in
28 reviewing the SIA work plans and has advocated for a

1 costly analysis. (Defendants' Opening Brief, Exh. F at 2).
2 When the Port continued to refuse to meet its cost-sharing
3 obligations, Defendants raised the issue with the Court.
4 No "material breach" of the Agreements limits the Court's
5 authority to decide this issue.

6 E. Discussion

7 Defendants have presented the issue of the Port's
8 liability for one-third of the costs of the SIA at the
9 Site as a discovery dispute. However, the Court does not
10 view this dispute as a discovery dispute. No discovery has
11 even begun in this action at the specific requests of all
12 parties. Instead, the 1998 Agreement specifically states
13 as follows:

14 1. Each party shall be responsible for the timely
15 payment of its one-third share directly to a contractor
16 that performs work at the Site;

17 2. Each party's timely payment to a contractor that
18 performs work at the site is an independent obligation;

19 3. If any party fails to pay its full share or any
20 portion thereof of the costs to the contractor in a timely
21 manner, the other parties shall make payments to the
22 contractor in equal shares;

23 4. Any party that fails to pay its full share in a
24 timely manner is in breach of the agreement; and

25 5. The other parties to the Agreement have the right
26 to seek recovery of one-third of the payments made on
27 behalf of the non-paying party, including interest, costs,
28 and attorneys fees, in a civil action for reimbursement.

1 The Court views the 1998 Agreement as providing a
2 remedy for Defendants to compel the Port to pay its share
3 of the costs of the SIA. That remedy is a civil action in
4 which Defendants may seek recovery of payments, interest,
5 costs, and attorneys fees from the Port for its non-
6 payment of its share of the costs paid to a contractor
7 that performed work at the Site.

8 Such an action may seek specific performance of
9 certain terms of the 1998 Agreement, or may simply seek
10 reimbursement from the Port for its share of the costs
11 Defendants paid to the SIA contractor for work performed
12 at the Site. Further, the Port's arguments that it has a
13 conflict of interest in paying its share of the costs of
14 the SIA, that changed regulatory circumstances make the
15 1998 Agreement inapplicable, that it must seek Port
16 Commissioners' approval before paying its share of the
17 costs of the SIA, and that Defendants are not entitled to
18 specific performance of the Agreements because they have
19 breached other terms of the Agreements, can be presented
20 in a civil action that may be brought by Defendants
21 against the Port. At this time, such a civil action has
22 not been brought by Defendants against the Port. The Court

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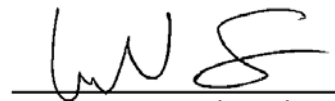
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1 leaves the parties to seek the remedy to which they
2 specifically agreed.

3 IT IS SO ORDERED.

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5 DATED: October 10, 2013

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8 Hon. William V. Gallo
9 U.S. Magistrate Judge
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